SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
JUL 20 1968
JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 323

PETE a.k.a. PETER RECZNIK,
Petitioner,

vs.

THE CITY OF LORAIN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals, Ninth Judicial District of Ohio.

MEYER GORDON,
GORDON & GORDON,
309 Broadway Building,
Lorain, Ohio 44052,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Opinions of the Courts Below ____ 2

Statement of the Grounds on Which the Jurisdiction of This Court Is Invoked ____ 2

Questions Presented ____ 3

Constitutional and Statutory Provisions Which the Case Involves ____ 3

Manner in Which the Federal Question Sought to Be Reviewed Was Raised ____ 5

Statement of the Case ____ 5

Arguments Relied on For Allowance of the Writ ____ 8

Conclusion ____ 12

Appendices:

A. Order of the Supreme Court of the State of Ohio Denying Rehearing, May 8, 1968 ____ 13

B. Orders of the Supreme Court of the State of Ohio ____ 13

C. Opinion of the Court of Appeals ____ 14

D. Journal Entry of the Court of Appeals ____ 15

E. Opinion of the Court of Common Pleas ____ 16

F. Journal Entry of the Court of Common Pleas ____ 16

G. Journal Entry of the Municipal Court of Lorain ____ 18

H. Opinion on Motion to Suppress in the Municipal Court of Lorain ____ 19

I. Motion for Rehearing on Motion to Suppress Evidence and Affidavit, Municipal Court of Lorain, Ohio ____ 20

TABLE OF AUTHORITIES.

Cases.

Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223 (1964) ____ 10

Bock v. City of Cincinnati, 43 Ohio App. 257 (1931) 9

Columbus, City of, v. Holmes, 107 Ohio App. 391, 152 N. E. 2d 301 (1958), affirmed 169 Ohio St. 251 9

Huth v. Woodard, 108 Ohio App. 135 (1958) ____ 9

Johnson v. U. S., 333 U. S. 10, 92 L. Ed. 436 ____ 10

Lakewood v. Smith, 1 Ohio St. 2d 128 (1965) ____ 8, 9

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081 (1961) 8

McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191 (1948) ____ 8, 9, 10

People v. Lund, 271 N. Y. S. 2d 164 (1966) ____ 8

Constitution.

Constitution of the United States:

Fourth Amendment ____ 3, 8

Fourteenth Amendment ____ 3, 8

Statutes.

Codified Ordinances of the City of Lorain, Ohio:

Sec. 513.01 ____ 2, 4

Sec. 513.03 ____ 2, 4

Sec. 513.07 ____ 2

28 U. S. C. 1257(3) ____ 2

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

PETE a.k.a. PETER RECZNIK,

Petitioner,

vs.

THE CITY OF LORAIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Court of Appeals, Ninth Judicial District of Ohio.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The Petitioner, Peter Recznik, prays that a writ of certiorari issue to review the judgment of the Court of Appeals, Ninth Judicial District of Ohio, made and entered by said court on November 7, 1967 (a copy of which is attached hereto as Appendix D).

The Ohio Supreme Court refused further appellate review on May 6, 1968, thus making the judgment of the Court of Appeals final on that date. Copies of the various entries made by the Ohio Supreme Court are attached hereto as Appendices A and B.

OPINIONS OF THE COURTS BELOW.

The opinions of the lower courts were not reported.

Petitioner's case was heard first in the Lorain Municipal Court, Lorain County, Ohio. All three (3) counts (violations of city ordinances 513.01, 513.03, and 513.07) in Cases No. 109175 and No. 109285 were heard together. Before trial, the Court denied on all counts Petitioner's Motion to Suppress evidence seized (Appendix H). A further Motion for Rehearing on Motion to Suppress Evidence was also denied by the court (Appendix I) during the course of trial. The case was submitted to the jury and the Petitioner was found guilty on all three (3) counts. Petitioner's Motion for New Trial was also denied by this Court (Appendix G).

Petitioner appealed to the Court of Common Pleas of Lorain County, Ohio, Case No. 70057. The opinion of the municipal court below was affirmed on the first two counts but reversed on the third (Appendices E and F).

Petitioner then appealed to the Court of Appeals for Lorain County, Case No. 1764, but the opinion of the Court of Common Pleas was affirmed (Appendices C and D).

Motion to Certify in the Supreme Court of Ohio was denied. Petitioner's final Motion for Rehearing was similarly denied (Appendices A and B).

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The judgment of affirmance by the Supreme Court of Ohio was entered May 6, 1968; hence, the petition herein being filed within ninety days of May 6, 1968, the jurisdiction of this Court is invoked under 28 U. S. C. paragraph 1257(3) since "rights, privileges and immunities" under the United States Constitution are claimed to have been violated.

QUESTIONS PRESENTED.

(1) May a police officer enter a private apartment without a search or arrest warrant, obtain evidence of gambling and then make an arrest, where he trespasses upon the premises in violation of defendant's constitutional rights secured by the Fourth and Fourteenth Amendments to the Constitution of the United States?

(2) May a police officer enter a private apartment when no misdemeanor had been committed in the presence of the officer, make an arrest *after* entering the premises and seeing a dice game, which fact was disputed, confiscate gambling devices and use the same in evidence against the defendant?

(3) Is it prejudicial error to permit contraband to be admitted in evidence and shown to the jury which contraband was suppressed on appeal by the Common Pleas Court but permitted by the trial court to be displayed to the jury during the course of the trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES.

Constitution of the United States:

Amendment XIV, Section 1, Clause 2:

"* * * nor shall any State deprive any person of life, liberty, or property without due process of law * * *."

Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Codified Ordinances of the City of Lorain, Ohio:

Section 513.01:

"No person shall keep a room, building, harbor, booth, shed, tenement, canal boat, or other water craft, to be used or occupied for gambling, or knowingly permit it to be so used or occupied, or being the owners thereof rent it to be so used or occupied. An owner of such building, tenement, or water craft knowing that a device is used or kept therein for gambling, who does not forthwith make complaint against the person so using or keeping it has knowingly permitted to be used and occupied for such purpose."

Section 513.03:

"No person shall keep, maintain or exhibit for gain or to win money or other property, or cause or permit to be so kept, maintained or exhibited a gambling table, or faro or keno bank, or a gambling device or machine, or a billiard table for the purpose of gambling or allow it to be so used, or a slot machine or pinball machine, or any machine, device or instrument which may be operated by the use of any coin, token, slug or disc, whether such machine, device or instrument purports to vend or distribute merchandise, or to furnish recreation or amusement, if such machine, device or instrument when so operated, returns or distributes more or less merchandise than it purports to return or distribute, or returns or distributes one or more coins, slugs, tokens or discs, or tabulates a score, number or make which may be used for obtaining merchandise or other articles of value."

MANNER IN WHICH THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS RAISED.

Prior to trial, petitioner moved to suppress illegally acquired evidence, which effort was renewed by filing an Application for Rehearing and during the course of the trial. Each of the violations of the petitioner's constitutional rights was seasonably presented in the Municipal Court, the Court of Appeals and the Supreme Court of Ohio.

STATEMENT OF THE CASE.

The Petitioner, Peter Recznik, was the owner of property located at *1420* and *1422* Broadway, Lorain, Ohio. The premises consist of two separate units, with separate entrances and with no connection between them. 1420 is a downstairs storeroom with a basement and a front and rear entrace and was used as a cigar store. It was dark and closed at the time in question. 1422 Broadway is an upstairs suite consisting of five rooms and bath and was occupied as living quarters, at the time in question, by John Micjan.

On June 10, 1965, at about 1:00 A.M., there was a party with a number of people in the upstairs suite. Officer Kochan, assigned to patrol the north end of the city and not the area of 1422 Broadway, on his own initiative, went to the locality of the Recznik property. He stated he had information from an unidentified informant, without stating that the informant was reliable (R. 48), and went to the location of the Recznik property, near an all-night restaurant (R. 106, R. 107), where he observed many cars around the building (R. 8) and two men enter the apartment by the rear stairway.

Officer Kochan asked the Petitioner, who was at the rear of the building, what was happening; Petitioner re-

plied: "a party." The officer then stated he would be back in a half-hour.

Officer Kochan, accompanied by Officer Kienzle, returned in a half-hour and, without a search warrant or a warrant for arrest, went up the back stairway. They tried to look through the window, did not see anything, but only heard voices (R. 10). The officers had no evidence to make an arrest *before* entering the premises (R. 60, lines 8 through 19).

Officer Kochan then pulled open the back screen door which was latched on the inside and entered the premises. He stated that Recznik was at this back door. The officers immediately observed a number of people standing, eating, drinking coffee and playing cards.

The back room, or kitchen, was separated from the front room by an intermediate room. Officer Kochan stated that, as he was going to the front room, Recznik said that you can't go in there. Kochan continued through other various rooms and claimed that he then saw Recznik leave the door to the front room from the intermediate room ajar about 12 or 13 inches. Through this small opening Kochan stated that he observed dice gambling in the front room and consequently ordered everyone under arrest. Officer Kienzle, who accompanied Officer Kochan, stated that he saw *no gambling* (R. 113) and that the Petitioner, Recznik, was standing in the back room (kitchen) and did not leave that room (R. 109, 111, 113).

Thereafter, the officers went to a side room, found a duffle bag and poured the contents of the bag which contained chips and dice onto a dice table located in the front room. A newspaperman appeared and took a picture of the table upon which the contents of the duffle bag had been poured. This picture was printed in the daily paper

and was introduced to the jury but was not a true picture of the front room when Officer Kochan first entered (R. 180, 181).

The officers took the dice, chips and table to the police station. After the petitioner had been taken to the station, a further search found a number of keys. With one of these keys, the officers opened the downstairs storeroom where there was no evidence of any activity and found 16 boxes of old punch and tip boards in the basement (R. 121). Neither of the officers, at any time, had a search warrant, nor were they in pursuit of making an arrest nor were they given permission to enter.

In the municipal court, a timely Motion to Suppress the Evidence was filed. The motion was overruled. Thereupon, a Motion for a Rehearing to Suppress Evidence with an Affidavit of Recznik was filed. It was agreed by the prosecuting attorney and municipal court that the evidence in the main case would be considered by the court on the question of the Motion to Suppress Evidence during the course of the trial. The court overruled the rehearing on the Motion to Suppress Evidence and permitted the introduction of all the gambling equipment into the evidence. The case was submitted to the jury who found the petitioner guilty on all three counts.

On appeal to the Common Pleas Court, the court sustained the Motion to Suppress as to the third count in case No. 109285, Municipal Court, but affirmed the judgment of the Lorain Municipal Court on the first two counts convicting Recznik for keeping a place for gambling and exhibiting gambling devices, misdemeanors under the City Ordinances. The Court of Appeals affirmed the Common Pleas Court. The Supreme Court of Ohio refused to review on the Motion to Certify and the Application for Rehearing was denied.

Pursuant to Ohio law, therefore, the decision of the Court of Appeals of the Ninth District of Ohio became the judgment of the highest court of the state in which a decision could be had.

ARGUMENTS RELIED ON FOR ALLOWANCE OF THE WRIT.

The Petitioner maintains that the decisions of the lower courts sustaining the convictions have violated his constitutional rights as secured by the Fourth and Fourteenth Amendments to the Constitution of the United States for the following reasons:

There was illegal entry into the apartment without a search or arrest warrant and the fruits of this illegal entry should have been excluded from the evidence, under the exclusionary rule laid down by this Court in the case of *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081 (1961). Likewise, see the cases of *People v. Lund,* 271 N. Y. S. 2d 164 (1966), and *McDonald v. United States,* 335 U. S. 451, 69 S. Ct. 191 (1948).

There was "unreasonable" search and seizure in the case at bar since the entrace to the apartment was made neither with a search or arrest warrant nor in pursuit to make an arrest. The entrance of the officers was a trespass. There was no permission for the officers to enter the apartment nor was there any consent given to the officers to make a search of the apartment. The fact that the officers went in without resistance does not give consent. *Lakewood v. Smith,* 1 Ohio St. 2d 128 (1965).

The instant case involves an apartment or living quarters and the courts have held that, except in emergencies, it will not sustain a search of a private dwelling or apartment without obtaining a search warrant. The

dominant theme involving a permanent home is the protection of the right of privacy.

The lower courts seem to indicate the apartment was open to the public but this conclusion was not fact since the upstairs apartment was a private dwelling of John Micjan. An officer may seize and use what he sees in plain sight or hears—if he is *lawfully* where he is, but *not if he is committing a trespass. Lakewood v. Smith,* 1 Ohio St. 2d 128 (1965). The search at its commencement must be valid and cannot be justified by what it produces; furthermore, an arrest cannot be justified by the fruit of an illegal search under the fruit of the poisoned tree doctrine. *McDonald v. United States,* 335 U. S. 451, 69 S. Ct. 191 (1948).

The arrest was for a misdemeanor and Ohio cases have held that a misdemeanor must be committed in the presence of the arresting officer to make an arrest valid. In *City of Columbus v. Holmes,* 107 Ohio App. 391, 152 N. E. 2d 301 (1958), affirmed 169 Ohio St. 251, the court states:

> "1. Where no misdemeanor is committed in the presence of a police officer there is no authority to make an arrest, on a mere suspicion or belief that a misdemeanor has been committed, without a warrant."

See, also *Huth v. Woodard,* 108 Ohio App. 135 (1958); *Bock v. City of Cincinnati,* 43 Ohio App. 257 (1931).

In this connection, we maintain that there was no misdemeanor being committed in the presence of an officer *before* he entered the apartment (R. 60). Officer Kochan was so intent on making the arrest that he claimed he saw gambling but this was *after he entered the apartment.* Officer Kochan contends that he saw petitioner come out

of the front room and that he looked over him and saw gambling. This was contradicted by Officer Kienzle who states on pages 109, 111 and 113 of the Record to the effect that he saw Recznik by the inner door of the kitchen when Officer Kochan went into the front room, that Recznik remained in the kitchen and that, although he saw cards on the table in the front room, he saw no money and therefore this did not constitute gambling.

We strongly maintain further that the officers had ample opportunity to obtain a search warrant and that without such warrant, the police had no right to make an entry into the upstairs suite. *Johnson v. U. S.*, 333 U. S. 10, 92 L. Ed. 436. Inconvenience and delay are not enough. No fleeing suspect, moving vehicle nor contraband was threatened to be removed. *McDonald v. United States*, 335 U. S. 451, 69 S. Ct. 191 at page 193 (1948). The case of *Beck v. Ohio*, 379 U. S. 89, 85 S. Ct. 223 (1964), spells out specifically that an officer must obtain a search warrant. Justice Stewart, the Ohio member of this Court, reversed all the lower courts in Ohio which had found defendant guilty. The Court held:

> "An arrest without a warrant by-passes the safeguard provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment; but whether or not the requirements of reliability and particularly of the information on which an officer may act are more stringent where an arrest warrant is absent, they cannot be less stringent than where an arrest warrant is obtained."

In the case of *McDonald v. United States, supra,* the arrest was also made without a search warrant. While

outside the house, an officer thought he heard an adding machine and entered the premises and saw evidence of gambling. Conviction by the lower court was reversed by the Supreme Court of the United States. Mr. Justice Jackson noted at page 195 in his concurring opinion:

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures. When an officer undertakes to act as his own magistrate, he ought to be in a position to justify it by pointing to some real immediate and serious consequences if he postponed action to get a warrant."

In the case at bar, we claim that the evidence is stronger than the above in that the officers had no right to enter the apartment which was at 1422 Broadway. It is to be noted that 1422 Broadway is the upstairs suite occupied as living quarters. The downstairs, which is 1420 Broadway, was a storeroom in which there was no one present and yet, the affidavit of arrest and charge claimed the offense took place at 1420 Broadway. Even if a search warrant had been obtained, it would have been invalid by reason of the wrong address.

Finally, the Petitioner did not receive a fair trial in that the municipal court permitted evidence to be introduced concerning the third charge which made an improper showing by displaying 16 boxes of tip boards during the trial so that it could prejudice the jury. The totality of the circumstances by virtue of permitting these exhibits, which were suppressed by the Common Pleas Court, to be in the courtroom during the entire trial prejudiced and prejudged this petitioner. This was error in permitting the unlawfully seized evidence, especially the punch and tip

boards under the third charge (which was reversed), in the courtroom during the *entire* trial and prevented the petitioner from having a fair trial.

CONCLUSION.

The petitioner contends that the police officers entered the apartment without a warrant, claimed they saw a dice game, confiscated gambling devices and then used the evidence seized against this petitioner. Petitioner maintains that, since the officers saw no misdemeanor committed, they had no right to enter the apartment without a warrant, that the fruits of the illegal search should have been excluded from the evidence and that the Motion to Suppress should have been sustained.

Petitioner earnestly urges that this Court grant certiorari to review his cause.

Respectfully submitted,

MEYER GORDON,
GORDON & GORDON,
Attorneys for Petitioner.

APPENDIX A.

Order of the Supreme Court of the State of Ohio Denying Rehearing, May 8, 1968.

It is ordered by the Court that rehearing in this case is denied.

APPENDIX B.

Orders of the Supreme Court of the State of Ohio.

ORDER DISMISSING APPEAL.

This cause, here on appeal as of right from the Court of Appeals for Lorain County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Municipal Court of Lorain to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lorain County for entry.

ORDER OVERRULING MOTION TO CERTIFY RECORD.

It is ordered by the Court that this motion is overruled.

APPENDIX C.

Opinion of the Court of Appeals.

(Decided Nov. 3, 1967.)

After a trial by jury, the defendant was convicted in the Municipal Court of the City of Lorain, for violation of city ordinances numbers 513.01 (keeping a place for gambling; 513.03 (exhibiting gambling devices); and 513.07 (possession or custody of numbers game).

The defendant appealed that judgment to the Court of Common Pleas of Lorain County; the judgment of the trial court as to the violation of ordinance number 513.07 was reversed; and the judgment of the trial court as to the violation of ordinances numbers 513.01 and 513.08 was affirmed.

An appeal on questions of law is lodged in this Court as to the two convictions. We have examined the bill of exceptions with extreme care, and, also, the numerous claimed errors with reference thereto. We do not deem it necessary to set out in full here all of the errors asserted by the defendant. The evidence established, beyond a reasonable doubt, the guilt of the defendant, Pete Recznik. There is no error in the record prejudicial to any substantial right of the defendant, and we determine that the judgment of the Court of Common Pleas must be affirmed.

Judgment affirmed.

APPENDIX D.

Journal Entry of the Court of Appeals.

(Entered Nov. 7, 1967.)

This cause came on to be heard on appeal on questions of law by the said Pete Recznik, Defendant-Appellant herein, the original papers or transcripts thereof, and a duly certified Transcript of the Docket and Journal Entries of the Court of Common Pleas of Lorain County, Ohio, filed therewith in the said City of Lorain, Plaintiff-Appellee and Pete Recznik, Defendant-Appellant, was argued by counsel.

Upon consideration whereof the Court finds that in the record and proceedings aforesaid there is no error manifest upon the face of the Record of said Court of Common Pleas, and the judgment of said Court of Common Pleas is affirmed.

It is ordered that the said Appellant pay the costs of this Proceeding taxed at $----------, and in default thereof that execution issue therefor.

The Court finds there was reasonable cause for this appeal.

It is further ordered, adjudged and decreed that the judgment of the Municipal Court in Case No. 109175 be and the same is hereby affirmed and the execution of judgment be suspended pending appeal. Bond heretofore posted by the Defendant-Appellant is continued. Exceptions to Peter Recznik, Defendant-Appellant.

APPENDIX E.

Opinion of the Court of Common Pleas.

This cause coming on to be heard on appeal from the Municipal Court, the Court on consideration thereof, affirms the lower Court on the first two (2) counts and reverses on the third count.

The search of the storeroom in this case was too remote in time to have been incidental to the arrest and therefore, search without warrant failed to meet the test of reasonableness under the 4th amendment rendering evidence obtained as a result thereof inadmissible.

The search must be contemporaneous with the arrest. Here the defendant was arrested and booked, and then the search took place on the third count.

Police officer's knowledge of accused's * * * previous record of arrests or convictions of themselves would not constitute probable cause. See *Beck vs. State of Ohio,* 3 (O. Misc.) 71, et al.

Exceptions.

See Journal.

APPENDIX F.

Journal Entry of the Court of Common Pleas.

(Entered Feb. 20, 1967.)

The said parties appeared by their attorneys and this cause came on to be heard upon the Notice of Appeal of Peter Recznik, defendant-appellant herein, together with the transcript of the docket and journal entries from the Municipal Court of Lorain, Lorain County, Ohio, and such

original papers or transcripts thereof, were necessary for said appeal, filed in said cause; wherein City of Lorain, plaintiff-appellee and Peter Recznik, defendant-appellant mentioned and referred to in said Notice of Appeal was argued by counsel.

Upon consideration whereof, the court finds that in the record and proceedings aforesaid, there is no error manifest upon the face of the Record of the said Court of Common Pleas affirming the judgment of the Municipal Court of Lorain for the first two charges involved in case No. 109175 in the Municipal Court of Lorain; but as to the third charge as set forth in Municipal Court of Lorain, Ohio, case No. 109285, there is error manifest upon the face of the Record to the prejudice of appellant, to-wit: that judgment should be rendered for the defendant, Peter Recznik, in the said third charge as set forth in the Municipal Court of Lorain case No. 109285, and therefore the judgment of the Municipal Court of Lorain as to the third charge or charges in case No. 109285 is set aside, reversed and held for naught and the defendant is released and discharged from the said charge and the fine and sentence is held for naught.

It is therefore considered, ordered and adjudged by this Court that the charge as to case No. 109285 filed in the Municipal Court of Lorain, Ohio, being the third charge argued in the Court of Common Pleas is set aside, reversed and held for naught at the costs of the City of Lorain.

It is further ordered, adjudged and decreed that the judgment of the Municipal Court in Case No. 109175 be and the same is hereby affirmed and the execution of judgment be suspended pending appeal. Bond heretofore posted by the defendant-appellant is continued, exceptions to both parties.

APPENDIX G.

Journal Entry of the Municipal Court of Lorain.

(Filed October 14, 1965.)

Defendant Pete Recznik in Court this date with Attorney Meyer Gordon for disposition of the Motion for a new trial filed by said defendant which was taken under advisement after an oral hearing and the filing of briefs in support of said motion. The Court upon consideration overrules the motion for a new trial. Defendant Pete Recznik was inquired of if he had anything to say why Judgment should not be imposed and Defendant having nothing further to say than he hath already said.

It is therefore the judgment of law and sentence of the Court that Defendant be assessed a fine of $500.00 and costs and 90 days in the City Jail with 75 days withheld pending probation to Inspector M. Mumford for a period of three years on the first count of Keeping a Place for Gambling, and be assessed a fine of $500.00 and costs and 90 days in the City Jail with 75 days withheld pending his probation on the second count of Exhibiting Gambling Devices. It is further ordered that all the devices, papers, dice tables, punch boards etc., used for the purpose of gambling are hereby ordered confiscated and destroyed. Defendant Pete Recznik, by his Attorney Meyer Gordon, gave notice of his intention to file an appeal herein, and on motion it is ordered that the imposition of the sentence and judgment herein against said defendant be withheld pending his appeal and upon a recognizance being given by the said Pete Recznik in the sum of $1850.00 with security to the approval of the Court Clerk conditioned that the defendant will appeal without delay and abide by the judgment and sentence of the Court. (See case No. 109285.)

Verdict filed Sept. 17th, 1965: Defendant, Guilty of Exhibiting Gambling Devices, contrary to City Ord. 513.08.

Verdict filed Sept. 17, 1965: Defendant, Guilty of Keeping Place for Gambling, contrary to City Ord. 513.01.

APPENDIX H.

Opinion on Motion to Suppress in the Municipal Court of Lorain.

(Filed July 7, 1965.)

This cause came on for hearing on a motion filed by the defendant Pete Recznik to suppress the evidence herein for the reason that an illegal search was made without a warrant and without having reasonable grounds. The Court upon consideration overrules defendant's motion for the following reasons, to-wit: That no evidence of any illegal search or seizure was presented. Defendant merely presented oral and written arguments in support of his motion. Furthermore the police officers upon investigation of complaints and observing unusual activity at a late hour at the place in question, entered this public establishment and observed gambling being conducted openly and in full view of the police officers. There was no evidence of force or illegal entry presented. The officers having observed a crime being committed were not required to look the other way or to disregard the evidence merely because they had no search warrant. Where the building in question is a public establishment, the police officers have a right to enter even if only to make a routine check. After the police officers observed

the gambling and arrested the proprieter and owner of the building, any search thereafter of the premises was incident to the arrest and therefore proper. The Court finds no violation or infringement of defendant's Constitutional rights as guaranteed by the fourth and fifth amendments. Exceptions.

APPENDIX I.

Motion for Rehearing on Motion to Suppress Evidence and Affidavit, Municipal Court of Lorain, Ohio.

Now comes Peter Recznik by Meyer Gordon, his attorney, and moves the court for a rehearing for the purpose of giving testimony and for the purpose of substantiating the affidavit hereto attached.

Your applicant prays that the said application for rehearing be granted for the reason that the overruling of the motion to suppress evidence by the court invades the constitutional rights of the defendant herein.

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 323

PETE a.k.a. PETER RECZNIK,

Petitioner,

vs.

THE CITY OF LORAIN,

Respondent.

ANSWER BRIEF OF RESPONDENT.

HENRY T. WEBBER,
205 Commercial Building,
750 Broadway,
Lorain, Ohio 44052,
Attorney for Respondent.

MEYER GORDON,
GORDON & GORDON,
309 Broadway Building,
Lorain, Ohio 44052,
Attorneys for Petitioner.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-5647

TABLE OF CONTENTS.

Statement of the Case 1

Law and Argument 3

Conclusion 13

TABLE OF CASES.

Beck v. Ohio, 379 U. S. 89, 85 S. Ct. 223 (1964) 7

Bock v. City of Cincinnati, 43 Ohio App. 257 (1931) 8

Columbus, City of, v. Holmes, 107 Ohio App. 391, 152 N. E. 2d 301 (1958), affirmed 169 Ohio St. 251 ..... 7, 9

Johnson v. U. S., 333 U. S. 10, 92 L. Ed. 436 10

Lakewood v. Smith, 1 Ohio St. 2d 128 (1965) 6

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081 (1961) 4

McDonald v. United States, 335 U. S. 451, 69 S. Ct. 191 (1948) 4, 8, 10

United States v. Rabinowitz, 1950, 339 U. S. 56, 63, 70 S. Ct. 430, 434, 94 L. Ed. 653 10

In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. _____.

PETE a.k.a. PETER RECZNIK,

Petitioner,

vs.

THE CITY OF LORAIN,

Respondent.

ANSWER BRIEF OF RESPONDENT.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioner in this action, Peter Recznik, is the owner of property located at 1420-1422 Broadway, Lorain, Ohio. The premises at this location consist of a two-story building: the street level being used as a cigar store, the second floor containing rooms. There is no dispute in fact as to who the owner was of the building at the time of the arrest.

On or about June 10, 1965, and shortly before 1:00 A. M. Officer Kochan received information that there was gambling going on at the above-described premises owned by petitioner, Peter Recznik. He received this information from an unidentified informant. Officer Kochan then proceeded to the property located at 1420-1422 Broadway, Lorain, Ohio, and made visual observations to attempt to corroborate the information he had obtained from the informant. Officer Kochan and his

partner left the area of their normal patrol to do this. They observed at the above address an unusual amount of traffic and kept the address under observation for a short time.

Officer Kochan, in the record, indicates that there were roughly 20 to 25 cars in the front on the premises and an equal number in the rear. (Page 8 of the Record, lines 13 and 14.) This would be an unusually high number of cars for this area, and Officer Kochan, who is a veteran police officer and extremely familiar with this area, was aware of this.

The officers drove around the area keeping it under observation and they noticed that the blinds were open a little and they could see someone looking out. Mr. Recznik, the petitioner, came out and came downstairs and walked over to the cruiser. Officer Kochan asked the petitioner what was going on and he indicated there was nothing going on upstairs. Officer Kochan admonished him that there had better not be, according to Officer Kiensle, and that they would be back. The officers left and returned fifteen or twenty minutes later.

Then, they observed persons going into the building and Officer Kochan and his partner, based on the information of the informant and on personal observations and knowing that their surveillance and presence had been discovered, walked to the second floor where a large gathering appeared to be; and were permitted to enter and walk around and observe people playing cards. It should be pointed out, that from all indications, the door was not locked and no force was required.

Officer Kochan then proceeded to walk towards another room but was met by the petitioner and was advised that he could not enter the other room. While the officer was talking to petitioner, he observed over petitioner's

shoulder and through a partially open door, a dice game going on in the other room, and heard remarks being made within the other room which indicated that a dice game was going on. He thereupon informed the petitioner that he and the other occupants of the room were under arrest. A search of the premises was then conducted and the gambling paraphernalia was confiscated.

The petitioner was tried before a jury on three counts and convicted on three counts; the conviction appealed to the Court of Common Pleas. The Court of Common Pleas reversed the conviction of the lower Court on the third count, this case being Lorain Municipal Court Case No. 109285. The Court of Common Pleas sustained the decision of the Lorain Municipal Court on the remaining two charges. The decision of the Court of Common Pleas was appealed to the Court of Appeals, Ninth District, and the judgment of the Lorain Municipal Court and the Court of Common Pleas was sustained by the Court of Appeals. The case was then appealed to the Supreme Court of the State of Ohio and that Court refused to certify the case after it had considered both the briefs and oral arguments.

LAW AND ARGUMENT.

This case originated in the Lorain Municipal Court and has been reviewed on appeal three times, first by the Court of Common Pleas, Lorain County, second by the Court of Appeals of the Ninth Judicial District and third, by the Supreme Court of the State of Ohio.

The only true constitutional question involved in this case is the much overworked question of search and seizure. This question has been very carefully studied by this Court. The question even in the area of search and seizure is one of fact more than of law.

The law and the facts in this case as have been pointed out have both been re-worked four times. The question of whose testimony the Court wishes to believe or a jury wishes to believe is based on many things as the trial record is often silent on such things as manner of response to questions, sincerity and believability.

The jury chose, along with the four lower Courts, to believe Officer Kochan.

The writer would believe that all the Courts accept and follow the exclusionary rule set down by this Court in the case of *Mapp v. Ohio*, 367 U. S. 643, 6 L. Ed. 2d 1081. The question of the reasonableness of a search without a warrant is more generally a question of fact. It must in the first instance be reviewed by the original trial Court.

As to the question of search and seizure it would seem important to note the differences between this case and the cases such as *Mapp v. Ohio, supra,* and *McDonald v. United States,* 335 U. S. 451, 69 S. Ct. 191.

In *McDonald v. United States, supra,* the officers heard adding machines, entered through another party's window, then entered the hallway, and saw by looking through a window over the door, activity taking place. It was the indication by this Court in this opinion that the mere hearing of adding machines would not give rise to inference of any illegal activity. But this case differs from *McDonald v. United States, supra.* In the case before this Court; the officers had an informant. The officers reenforced the information they had received from their informant by going to the address where the illegal activity was supposed to be taking place and observing a large number of cars in the area, and people entering the building of petitioner.

The entrance took place at approximately 1:00 A. M., the officers had an informant; they have their own observa-

tions as to the amount of unusual traffic and activity about the area; and they had been discovered which is very important. Then the Petitioner comes down the stairs and talks with them and the police officers leave. Had they attempted anything at that moment, it in all probability would have resulted in no discovery because the petitioner was on notice of their presence. The occupants had undoubtedly been warned of the officers' presence and the officers then proceeded to leave and return fifteen or twenty minutes later, and further observed people entering the building, and they proceeded to investigate further. They went up the stairs, according to their testimony, entered the premises which at that point had taken on, from the amount of people, a public appearance. There was no attempt to stop the officers until they got near the gambling activity.

It would be only reasonable to infer that the Petitioner would not wait around indefinitely for the police officers to return with a search warrant; that the Petitioner was aware that the police officers were suspicious and would certainly have taken reasonable precaution so that the illegal material would not have been available and the activity would not have been going on had the officers gone to get a search warrant. Petitioner has had substantial experience with police officers and would be well aware of the time it would take to get a search warrant. Had the officers gone to a magistrate, presented the information which they had, and returned with a search warrant, they would have, with any luck at all, arrived some several hours, at its best, later; and would have undoubtedly found nothing. As I have indicated previously, petitioner, from his past experience, is well aware of police procedures.

Once discovery of the police officers' presence was made by the petitioner, the officers had only two choices: (1) To act on the basis of the information from their informant and on their own observations of the unusual amount of traffic and people entering the building, or (2) Simply forget about the matter. Because as has been previously stated, it certainly would not stretch anyone's imagination to believe that the petitioner would certainly have concealed his illegal activity by the time the police officers had returned. To say that once their presence had been discovered it was practicable for them to get a search warrant, would be to completely disregard procedures followed by individuals in the gambling business.

Petitioner further cites the case of *Lakewood v. Smith*, 1 Ohio St. 2d 128. In this case it was simply a question of the officer being permitted to enter the premises and then intercepting a telephone call which led to the obtaining of evidence against the defendant. The Court held that a person does not waive constitutional immunity from unreasonable search nor does he thereby consent to search by permitting the officer to enter the premises, and a police officer entering private premises by consent without a search warrant may not proceed to intercept incoming telephone calls. The *Lakewood v. Smith, supra,* case would not appear to be applicable because (1) no telephone calls were intercepted, and (2) the search in the case presently before this Court was incident to the arrest and not before the arrest. The actual physical search took place after the arrest. The writer might further point out, in that for all apparent reasons the premises where the search and arrest took place were open to the public; that a considerable amount of traffic was there; that the officer saw people walking into the building without any formality of admittance.

The petitioner cites *City of Columbus v. Holmes,* 107 Ohio App. 391, 152 N. E. 2d 301 (1958):

> "1. Where no misdemeanor is committed in the presence of a police officer there is no authority to make an arrest, on a mere suspicion or belief that a misdemeanor has been committed, without a warrant."

It should be pointed out that in this case before this Court there was no arrest made until the officers had actually heard and saw the violation being committed, and then they had not only the right but duty to make an arrest.

On page 10 of the Petition, petitioner maintains that the officers had ample opportunity to obtain a search warrant and that without such warrant the officers had no right to make entry into the upstairs suite.

As we have previously pointed out, once the presence of the police officer is discovered, if he had sufficient information to get a search warrant as to gambling activity going on in a certain place at a certain time, he might as well forget about it, because no one is going to stand around and wait the several hours that is required to arouse a magistrate, give him the information, get a search warrant typed and return to the scene. The discovery by the petitioner of the presence of the officers certainly made immediate action necessary.

The petitioner in support of his contention as to obtaining a search warrant relies heavily upon *Beck vs. State of Ohio,* 3 O. Misc. 71, 379 U. S. 89, 85 S. Ct. 223. In the *Beck vs. Ohio, supra,* case the officer stopped the defendant on the basis of pictures of defendant, that he knew he had a record prior to conviction with respect to clearing house slips. The Court found that this was insufficient evidence and that if the arrest was proper, then

the search would have been proper, and with this proposition we find no quarrel.

In this case before the Court the officer heard and saw the commission of crime and made an arrest based on the actual observance of that crime. That he entered the apartment based on information received as well as having personally observed activity corroborating the information received from an informant. They were further discovered outside prior to making an attempt to enter the premises, which made some sort of immediate action necessary.

Petitioner further, on page 11, attempts to contend that evidence presented in the case before this Court was stronger than that involved in *McDonald vs. United States, supra.* Petitioner raises the question of the two addresses to his buildings. It should be again pointed out that this whole building was owned by petitioner and subject to his use and being used for the purposes which the informant of Officer Kochan indicated they were being used for.

The fact remains that the officers entered the building where they expected to find activity, and they saw activity with their own visual observation to corroborate the information received from the informant.

There is no attempt to quarrel with the law of the cases cited by petitioner, it is simply that the facts in the cases cited are substantially different.

Petitioner further cites *Bock v. City of Cincinnati,* 43 Ohio App. 257 (1931). In the *Bock v. City of Cincinnati, supra,* case, the officers who made a search without the slightest reason or probable cause to make the search, simply went in and picked up a note pad of defendants, and shook out some race horse slips. The facts in this case again bear no resemblance to the case presently before

this Court. There were no informants involved, no personal observations based on the information by the informant to corroborate his information, as there is in the present case before this Court.

Petitioner cites the case of *City of Columbus vs. Holmes,* 107 O. App. 391, 152 N. E. 2d 301 (1958). The question involved was of an arrest for disorderly conduct and for failing to obey a police officer in the discharge of his duty. The defendant was found innocent of the disorderly conduct charge, but guilty of obstructing or failing to obey the police officer, and dealt with the question that if she was not acting disobediently, if she, in fact, had the right to resist the officer arresting her. Also involved was the question of ownership of private property, but nothing in the facts are similar to the case before this Court. The Court held that any unlawful interference with the rights of personal property may be resisted, and every person has the right to resist an unlawful act, and an officer has no right to make an arrest for a misdemeanor on a mere suspicion that a misdemeanor has been committed without warrant. None of these facts are present in the case before this Court. There was no attempt to settle property rights, and the arresting officer actually saw the violation and heard the violation being committed, and he certainly had the right and duty as a law enforcement officer to make an arrest.

The question of the reasonableness of search must also be taken in light of fact present at the time and as this Court has previously stated, there can be no fixed formula as to reasonableness of searches:

> "Because there can be no fixed formula, we are admittedly met with recurring questions of the reasonableness of searches, 'but less is not to be expected when dealing with a Constitution, and, at any rate,

(reasonableness) is in the first instance for the (trial Court) to determine.'" *United States vs. Rabinowitz*, 1950, 339 U. S. 56, 63, 70 S. Ct. 430, 434, 94 L. Ed., 653.

The duty of law enforcement is not a cat and mouse game, it is a deadly serious job of maintaining order in our society.

It is necessary that a police officer have some reasonable latitude based on sufficient probable cause, to make a search. Here an officer had an informant, then tried to back up the information of the informant by his own personal observations and those of his partner. It is the respondent's contention that with the probability of the concealment of the evidence and the illegal activity after the officers were discovered outside, that they were justified in pursuing the course that they followed.

This is not the situation whereas in *McDonald vs. United States, supra,* they simply heard adding machines and then commenced to make an entry. Here, in this case before the Court, the officers had the observations of the unusual traffic and activity at the building of petitioner and they had the information of their informant.

This case differs substantially again from the *Johnson vs. United States,* 333 U. S. 10, 92 L. Ed. 436, case which is cited by the petitioner, where the officers had an informant and smelled opium outside the room which they later searched; and there was no reason why a man could have been brought outside until a warrant was obtained since there was no belief that they had knowledge that they were under surveillance or had any suspicions that they were under surveillance.

Further, in the case at hand, there was access to this apartment to all those who seemed to want to go in and out.

We respectfully submit, that the officers had a duty on that evening to act as they did, based on the information of their informant, which was corroborated by their own observations.

We believe that the officers would be proper in reasonable belief that once told gambling was taking place and observing this type of traffic, to assume that their information was completely correct, and once they were observed outside the building, it would become only a question of time until the proceedings upstairs would be wound up; and the evidence would not have been available had the officers gone to obtain a warrant.

Therefore, we respectfully submit that the officers had probable cause to enter the apartment without a search warrant at that time; that the search which followed in which a majority of the gambling paraphernalia was uncovered took place after Officer Kochan observed and heard the gambling going on while talking to petitioner. He thereupon placed the petitioner under arrest and proceeded to search the immediate area of rooms to confiscate the gambling paraphernalia, the dice tables as evidence.

There could be no serious argument that the officers had not only the right but the duty and the obligation to make the arrest.

As has been previously stated and respondent would state again, this is a question of fact and the application of existing law in this case.

This Court has on previous occasions, as has already been pointed out, indicated there is no fixed formula when it comes to the question of search and seizure. There is no attempt on the part of the City of Lorain to quarrel with the existing interpretation by this Court on the question of search and seizure.

It is the respondent's contention that the facts as they appeared in this case, are different than those in the cases cited by the petitioner; and that the actions of the police officers involved are justifiable and proper.

Petitioner's last contention is that he did not receive a fair trial in that the Lorain Municipal Court permitted evidence to be produced concerning the third charge by improperly displaying 16 boxes of tip boards during the trial so that it could prejudice the jury.

There was substantial and different evidence used to convict the petitioner on the remaining two counts. What petitioner is attempting to suggest is that if evidence is present in a courtroom which pertains to the one of several counts and the petitioner is later either found not guilty or the conviction reversed on that count, that the defendant has been prejudiced as to a conviction on the other counts even if there is more than enough adequate and separate evidence used to convict on the other surviving counts.

If this were the law, it would mean that a defendant could not be tried on more than one count without risking the possibility of later having to be re-tried if conviction of one of the counts were later reversed.

Petitioner's proposal would certainly put an unreasonable and unwarranted burden on those charged with the duty of prosecuting criminal charges. Respondent knows of no authority for this and petitioner has continuously failed through all of his briefs, to cite any authority for his contention. It would seem that there is no compelling argument to this Court that it should consider this question at this time.

CONCLUSION.

Petitioner, on four occasions by four different Courts prior to arriving here, has had his case reviewed. It is strongly contended that his rights have been protected; that the authorities cited by the petitioner vary substantially in the facts from those presented in this case, and the authorities cited are not applicable to this case.

It is respondent's contention that the police officers' conduct was proper and justified as to the facts at the time of the arrest of petitioner.

Petitioner has had his rights adequately protected through the various reviews.

There is nothing new or novel or of such great interest or magnitude as to require this great Court to hear this case.

It is therefore respectfully submitted that Petitioner's petition for a writ of certiorari be denied, and the conviction of petitioner be permitted to stand.

Respectfully submitted,

HENRY T. WEBBER,
Attorney for Respondent.

SUPREME COURT OF THE UNITED STATES

October Term, 1968.

RECZNIK *v.* CITY OF LORAIN.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF OHIO, LORAIN COUNTY.

No. 323. Decided November 18, 1968.

PER CURIAM.

On the night of June 10, 1965, two police officers of the City of Lorain, Ohio, left their assigned cruising district and drove to the premises at 1420–1422 Broadway because they "suspected a crime was being committed" there. This suspicion was founded upon tips from persons who had stopped the officers on the street. Petitioner is the owner of the building at 1420–1422 Broadway, which contains two unconnected units. No. 1420 consists of the ground floor and basement and houses a cigar shop and storeroom. No. 1422 is a second story suite of rooms. When the officers arrived at the premises at approximately 1 a. m., they noticed an unusually large number of cars parked in the vicinity. According to their testimony they met the petitioner outside the rear entrance to the upstairs suite, warned him that there had better be nothing illegal going on inside, and said they would return in half an hour.

When they did return 20 minutes later, a large number of cars were still parked near the building, and the officers observed several men entering the upstairs apartment. The officers then climbed the stairs, listened to the sound of voices within, and tried to look through the window and door. Unable to see inside, they walked through the back doorway unannounced. As they headed for the front of the apartment, the petitioner emerged from a front room and told the officers they could not enter. Through the door opened by the petitioner, one of the

officers saw a dice game in progress in the front room. The officers entered the room, placed everyone present under arrest, and seized the table, chips, dice, and money which were being used in the game. Those arrested, including the petitioner, were taken to the police station. The police continued to search the apartment, and came across some keys which they thought might open the store and basement downstairs. Apparently because the officers "had information that there were all sorts of gaming devices downstairs," the store and basement were also searched thoroughly, and various numbers game paraphernalia were discovered and seized.

Petitioner was convicted in the Municipal Court of Lorain of violating three ordinances which prohibit keeping a gambling place, exhibiting a gambling device, and possessing a numbers game. His motion to suppress all the evidence which had been seized at 1420–1422 Broadway was denied, the court ruling, upon the evidence above summarized, that the officers had "entered this public establishment and observed gambling being conducted openly and in full view." On appeal to the Court of Common Pleas, the conviction for possession of the numbers game paraphernalia found in the lower unit of the building was reversed. The court held that since the petitioner had already been taken to the police station and booked, "the search of the storeroom in this case was too remote in time to have been incidental to the arrest." The Court of Appeals affirmed the convictions on the two remaining counts, and the Supreme Court of Ohio dismissed an appeal. Since we have concluded that the petitioner's rights under the Fourth and Fourteenth Amendments to the Constitution were infringed by the entry of the police onto his premises, we grant certiorari and reverse. *Mapp* v. *Ohio*, 367 U. S. 643.

The finding of the Municipal Court that the petitioner's apartment was a "public establishment" has no support in the record. While the cigar store was usually open to the public during business hours, it was closed and dark

at the time of the arrest. The upstairs suite was an entirely separate unit, with a different address and different entrances. The respondent's suggestion that the officers were privileged to enter because the apartment "at that point had taken on, from the amount of people, a public appearance," is untenable. The congregation of a large number of persons in a private home does not transform it into a public place open to the police.

Respondent argues that the entry into the apartment was justified as incidental to the arrest of the petitioner, whom the officers had probable cause to believe was conducting an illegal game. The senior arresting officer, however, did not so view the matter, for he conceded that when he entered the apartment, he "had no evidence to make an arrest." Nevertheless, it is argued, the officers could have entered to arrest the petitioner in view of the tips received from informers that evening and their own corroborating observations of the activities at the apartment. We cannot agree that the knowledge of the officers revealed by this record amounted to probable cause to believe that a crime was being committed. The testimony of one officer that the building was a "noted gambling joint" was stricken by the trial judge, and no further effort was made to show that either the petitioner or the apartment was at that time connected with illicit gambling operations. Nor did the respondent even attempt to establish that the informers were reliable. The officers identified these informers only as "people on the street" who were previously unknown to the officers and whose names they did not bother to ask because "there was no reason for it." They did not relate what information they received from these nameless individuals other than that there were "all sorts of gaming devices *downstairs*."

We have held that the prosecution has not met its burden when the arresting officers "said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner." *Beck-*

v. *Ohio*, 379 U. S. 89, 97. Even where a search warrant is obtained, the police must show a basis for the search beyond the mere fact of an assertion by an informer. *Aguilar* v. *Texas*, 378 U. S. 108. At least as much is required to support a search without a warrant. *Beck* v. *Ohio, supra*, at 96. Since the respondent did not meet the burden of showing probable cause in this case, the motion to suppress should have been granted.

The petition for certiorari is granted, the conviction is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, whom MR. JUSTICE HARLAN joins, dissenting.

The Court here summarily reverses the jury's conviction of petitioner Pete Recznik for violating the city's laws against keeping a gambling house and having possession of gambling tables and other gambling devices. The Court simply grants certiorari and reverses, giving the City of Lorain no opportunity at all to argue its case before us. I dissent from such a hasty, ill-considered reversal. To reverse the conviction, this Court holds that it was error for the trial court to deny Recznik's motion to suppress evidence obtained in part by a search without a warrant of the gambling establishment. Having read the entire 388 pages of testimony, I think that they show beyond doubt that there was no unlawful search and seizure and I think that an argument would reveal that fact to this Court. This is made clear by the *per curiam* opinion's reliance on an order of July 7, 1965, refusing, prior to trial, to suppress the evidence. This Court bases its reversal on its disagreement with the pretrial finding that petitioner's gambling house was a "public establishment." The Court states that this finding "has no support in the record." While I think that the more than 350 pages of testimony show far

more than enough evidence to support a finding that the so-called "apartment" was maintained as a public gambling house, and not as a private residence, it happens that this was only an alternative ground for the trial court's refusal to suppress at this pretrial hearing. The other ground was this:

> "The court upon consideration overrules defendant's motions for the following reasons, to wit: That no evidence of illegal search or seizure was presented. Defendant merely presented oral and written arguments in support of his motion."

The fact that no sworn evidence was presented to support the motion to suppress was, of course, sufficient to dispose of the pretrial motion as the court did. That this first pretrial motion is not now relied on by petitioner is shown by his statement to the court at the beginning of the trial to this effect:

> "Mr. Gordon: On the motion to suppress the evidence in this case, the court is to consider the evidence in the main case that will be presented to the Jury at this time and make its decision later."

At the end of the city's evidence the motion to suppress was made again and denied; it was again made and denied at the conclusion of all the evidence. So it is not to the first pretrial motion to suppress of July 7, 1965, that we must look but to the whole record. That record, in my judgment, shows that the petitioner, who owned the premises which he permitted to be used as a gambling establishment, not only did not object to the officers going into the building but actually invited them.

As the Court says, the building into which the officers entered belongs to the petitioner Pete Recznik. He is evidently a well-known gambler around town since he testified that he had been in and out of jail for around a quarter of a century, as had John Micjan whom the petitioner asserted was his upstairs "tenant" in the private "apartment" which was filled with dice, game

tables, and other gambling devices. In fact, Micjan had come to the "apartment" straight from the jail only a month or two before.

The arrest took place in the following factual context. While police officer Kochan was cruising around the streets some one told him that gambling was going on at Recznik's building. He and his partner decided to go up and look around in the area of the building. Now, of course this street information they had received would not alone have been enough to give probable cause either for a search warrant or an arrest. Nor did the officers treat it as enough. It was enough, however, for the officers to investigate, which they did. They went to the building about midnight and saw signs of extraordinary activities around it. While the bottom floor was dark, the upstairs, where the gambling paraphernalia was located, was well lighted. They saw about 40 to 50 automobiles parked in the front and rear of the building. They observed men coming in cars, getting out, going up the back stairs, and entering the upstairs rooms without any difficulty whatever. They observed someone upstairs peeping at them through venetian blinds and shortly thereafter petitioner Recznik came out and talked with them. Recznik did not then or at any time order the officers not to come up. Instead, according to petitioner Recznik's own testimony, he told officer Kochan that they were having a party upstairs and addressing the officer directly said: "If you want to come up you can come up." Again, Mr. Recznik testified: "I told him that first time we had a party that he was invited up and he says, 'I will be back later.'"

After these invitations the officers went away and came back about 1 o'clock a. m., finding the place still lighted and filled with people. The officers walked up the back steps, where they had seen the others walking in and out. They opened the door which they testified was unlocked. They saw many people there. Recznik testified that they pulled the screen door off its hinges.

The officers denied it and obviously neither the jury that convicted nor the judge that refused to suppress the evidence believed Recznik. Once inside the officers met Recznik. Recznik testified as follows in response to questions from the prosecuting attorney:

"Q. There has been a lot of talk about a warrant. Did you ask him to see a warrant?

"A. No, I didn't say nothing.

"Q. Did you tell him to stay out?

"A. No. Absolutely not.

"Q. Did you say, 'You can't come in here?'

"A. No.

"Q You just said, 'What do you want?'

"A. I said, 'What do you want.'

. . . . . .

"Q. Did you tell him 'You can't search this place?'

"A. Absolutely not. Why would I tell him that?"

. . . . . .

Officer Kochan testified that he saw dice and other gambling devices and that when Recznik opened the door to another room he, Kochan, looked over Recznik's shoulder and saw many people gambling on a large dice table upon which was money and a green table covering. Micjan explained the presence of the money and dice table in this illuminating way: the money, $213, he had found on the street in a purse; the large dice table had been brought to him by strangers and left in his "apartment." The moment Kochan (who had been invited by Recznik to come to the "party") saw all this gambling paraphernalia, saw the people with money in their hands, crying out in gambler's language "I fade you," he stated that all there were under arrest. That was his duty. Ohio law provides that an officer, seeing a person committing a misdemeanor, has a duty to arrest. Since the arrest was legal, the officer then had the authority

to search the remainder of the building without a warrant. This he did. And when the case got to the jury it promptly convicted.

There is no case decided by this Court that calls for a reversal here on the ground that the officer lacked probable cause to arrest for the misdemeanors he actually saw committed. One who will take the time to read this entire record as I have will find, I think, that this gambling establishment was so notorious in Lorain that it is not at all surprising that strangers to the police were urging them to do something about it. I wonder if in addition to having its just conviction reversed the City of Lorain will be compelled to return to their guilty owners the dice, dice tables, and other gambling devices that the officers took away as contraband? I regret very much that this Court, by its hasty, summary reversal, is providing its critics with such choice ammunition for their attacks.

I would deny certiorari. If, however, four members of the Court are determined to grant certiorari, I would set the case down for argument in the conventional fashion and the normal way.

MR. JUSTICE STEWART and MR. JUSTICE WHITE would deny the petition for certiorari.